A Solution to the Prospective Enforcement of Prior Arbitration Awards Based Upon the Prospective Injunction Model

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I. INTRODUCTION

Since the United States Supreme Court decided the *Steelworkers' Trilogy*,[1] binding arbitration has become a mainstay in American labor relations. Not only has the arbitration process been extremely successful for both management and labor unions, but it has also limited the burgeoning caseload in federal courts.

However, since the advent of the *Steelworkers' Trilogy*, numerous labor issues still remain unresolved. One such issue is the question of whether federal courts can enforce labor arbitration awards prospectively.

Unions most often seek prospective enforcement. By giving up the right to strike in favor of arbitration, unions have relinquished a primary and powerful economic weapon. Management has discovered that it is possible to "flood" the grievance process by repeatedly violating a collective bargaining agreement and denying grievances at each stage of the grievance procedure, thereby forcing unions to arbitrate. The result is that repeated arbitration over nearly identical grievances is likely to cause severe financial hardship for financially weaker unions. In some instances the employer is able to bring about a de facto change in the parties' contract, especially when the union has given up its right to strike.

Moreover, since employers are able to factor in arbitration as a production cost, the relative economic hardship suffered by an employer, as compared to a particular union, is quite small. In contrast, the union, in order to stay solvent, is forced to be more selective in deciding which employee grievances should be arbitrated. This pressure is especially strong when the employer's violations of the collective bargaining agreement are identical except for the identity of the grievant and the date on which the violation occurred.

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[1] The *Steelworkers' Trilogy* consists of three cases: United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

enforcement of labor arbitration awards. The standards for prospectively enforcing labor arbitration awards, however, have developed in a haphazard, common-law fashion because the United States Supreme Court has never definitively ruled on this particular issue. The result has been a wide range of judicial standards among the various federal circuits.

The purpose of this Article is to propose a practical and uniform standard to be used by the federal courts in determining whether a particular cause of action warrants prospective enforcement. By developing a new test, prospective enforcement will become an effective remedy for both employers and unions. Through prospective enforcement, violations of the collective bargaining agreement will be determined by contract interpretation rather than a method that weakens unions economically so that they cannot afford to dispute a contract through arbitration.

Following this introduction, the second section of this Article sets out the U.S. Supreme Court's principles and policy rationales developed in the *Steelworkers' Trilogy* and other cases. These cases provide both a context and foundation for modern labor relations, arbitration and judicial review.

The third section analyzes the major prospective enforcement cases and tests articulated and ultimately adopted in various federal circuit courts.

The fourth section examines both prospective injunctions and the federal courts' treatment of same. This section draws heavily from the U.S. Supreme Court's decision in *Boys' Markets Inc. v. Retail Clerks' Union, Local 770*[2] and lays the groundwork for establishing a uniform test for prospective enforcement of arbitration awards. This test is fully developed in the fifth and final section of this Article.

II. LABOR POLICIES PROMULGATED BY THE UNITED STATES SUPREME COURT

The purpose of this section is to briefly outline some of the foundational labor relations policies established by the Supreme Court. While not all-inclusive, this summary will provide a frame of reference for the reader, because many of these policies are frequently referred to throughout the remainder of the text.

In the *Steelworkers' Trilogy*, the U.S. Supreme Court outlined the basic framework of modern labor relations by defining and clarifying the role of the courts, the arbitrators, and the appropriate relationship between the union and the employer.[3]

In deciding the *Steelworkers' Trilogy*, the Supreme Court recognized a

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[2] 398 U.S. 235 (1970), *overruled in part by* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

[3] *See* cases cited *supra* note 1.

labor policy favoring arbitration. In this regard the Court stated:

> In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to [an] arbitrator.[4]

The Court further recognized that the scope of judicial review of arbitration awards is very limited. The federal courts may only ascertain whether the party seeking arbitration has made a claim that on its face is governed by the contract.[5] In this regard the Supreme Court held:

> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the [collective bargaining agreement] which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.[6]

The Court noted, "[i]n the context of the plant or industry the grievance may assume proportions of which judges are ignorant."[7] The Court also recognized that the judiciary often lacks expertise in resolving labor disputes:

> The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination

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[4] *American Mfg. Co.*, 363 U.S. at 567-68 (citation omitted).

[5] *Id.* at 568.

[6] *Id.* (footnote omitted).

[7] *Id.* at 567.

of a grievance, because he cannot be similarly informed.[8]

One of the most important concepts recognized by the Supreme Court is the therapeutic value of arbitration. On this point the Court stated, "The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."[9]

Finally, in a non-trilogy case, *Emporium Capwell v. Western Addition Community Org.*,[10] the Supreme Court held that it would not expect the courts to refrain from redressing those situations when an employer continually violates the terms of a collective bargaining agreement. Specifically, the Court held that "[o]ne would hardly expect an employer to continue in effect an employment practice that routinely results in adverse arbitral decisions."[11]

Although the foregoing is a brief summary of the policies regarding arbitration and the role of the federal courts, these policies should be kept in mind throughout the remainder of this Article.

III. MAJOR FEDERAL CIRCUIT COURT HOLDINGS REGARDING THE PROSPECTIVE ENFORCEMENT OF LABOR ARBITRATION AWARDS

The following section discusses the various tests formulated by the federal appellate and circuit courts in determining whether an arbitration award should be prospectively enforced. Each circuit is discussed in numerical order for the convenience of the reader. Further, the following is not intended to be a comprehensive analysis of every case in every circuit but rather an overview of the substantive tests developed that address the prospective enforcement issue.

A. *The First Circuit and "Material Factual Identity"*

In *Boston Shipping Ass'n v. International Longshoreman's Ass'n*,[12] the issue before the arbitrator was whether a certain section of a shipping facility included a shipping berth utilized by the employer and if so, whether the manning requirements for the shipping berth were maintained. Because the parties' old collective bargaining agreement had expired before the award was rendered, the union refused to abide by the award, claiming

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[8] *Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

[9] *American Mfg. Co.*, 363 U.S. at 568 (footnote omitted).

[10] 420 U.S. 50 (1975).

[11] *Id.* at 67 (footnote omitted).

[12] 659 F.2d 1, 2 (1st Cir. 1981).

it did not apply under the parties' then-current agreement.[13] The employer subsequently petitioned the district court for enforcement.[14]

At trial, the district court enforced the award and further held that the award had a "mandatory precedential effect" throughout the parties' collective bargaining term.[15] The union appealed the order on the ground that the district court order created a non-arbitrable contractual provision for the remainder of the contract term.[16]

In partially reversing the district court's opinion, the Court of Appeals emphasized that "the federal courts play an extremely limited role in labor arbitration."[17] Moreover, the court held that if enforcement of an arbitration award also requires interpretation, then the proper course of conduct would be to remand to arbitration.[18]

However, the Court of Appeals for the First Circuit upheld the district court's order to the extent that it enforced or "confirmed" the award.[19] The appellate court also held that the arbitration award would have a prospective effect.[20] The court reasoned that the arbitration award should be affirmed absent any "material change" in circumstances.[21] Because the only "material change" was the fact that the parties had entered into a new collective bargaining agreement, the court held there was no reason to prospectively enforce the prior award. In this regard the court stated:

> [I]f it is beyond argument that there is no *material factual difference* between the new dispute and the one decided in the prior arbitration that would justify an arbitrator's reaching a different conclusion, the new dispute is a "like" dispute subject to enforcement under the prior award. . . . Under this approach, if there is an arguable material difference, the dispute is for the arbitrator; if not, the parties are bound by their prior arbitration.[22]

The threshold issue in *Boston Shipping* concerned the physical boundaries of the shipping facility and the location of the shipping berth

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[13] *Boston Shipping*, 659 F.2d at 2.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Boston Shipping*, 659 F.2d at 3.

[19] *Id.* at 5.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 4.

therein. Because the shipping berth was either included or excluded from the scope of the employer's operations (and assuming the boundaries of the facility would not change), any subsequent dispute between the parties would have been identical.

Obviously then, the primary question left open in *Boston Shipping* is what constitutes a "material factual difference" sufficient to deny prospective information.[23] This question was resolved to some extent in *Derwin v. General Dynamics Corp.*[24] In *Derwin*, the union sought to simply confirm (as opposed to prospectively enforce) an arbitration award that authorized the issuance of off-the-job passes to union stewards.[25] Although a prior arbitration award had been rendered directing the employer to issue such passes, the union alleged there had been subsequent violations.[26]

In deciding to issue its confirmation, the court held that it was essentially being asked to put its "imprimatur on an arbitration award in a vacuum."[27] The court's primary fear was that without a "colorable basis" for confirming the award and no "material factual identity" (as stated in *Boston Shipping*) between the dispute at arbitration and subsequent violations, a precedent would be established whereby one party was given leverage over the other in contract negotiations or future arbitrations.[28]

In addition, the court feared that by merely "confirming" the award, such action could lead to a bifurcated approach whereby the court would be asked to "enforce" the award at a later date. On this point the court stated:

> [W]e question the need for or wisdom of this bifurcated approach. It seems to us cumbersome, unnecessary, and potentially misleading - especially as an order of confirmation issued in a factual vacuum may result in unpredictable pressure and aspersions upon the party against whom the order runs. Entry of a declaration "confirming" the award may be taken to imply that the defendant is in fact violating it. Courts, after all, do not enjoin parties from violating the law without proof of a real likelihood that such will happen. At very least, it is hard to fathom what the present debate over confirmation portends. Both parties profess to agree that the Stutz award is binding. A decree confirming it at this time will merely give the parties something more to argue about.[29]

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[23] *Boston Shipping*, 659 F.2d at 4.

[24] 719 F.2d 484 (1st Cir. 1983).

[25] *Id.* at 486.

[26] *Id.*

[27] *Id.* at 491.

[28] *See id.* at 492.

[29] *Derwin*, 719 F.2d at 491-92.

Given the facts of the case, the *Derwin* court's decision is sound. By refusing to become entangled in distinctions of confirmation or enforcement of a prior arbitration award, the court was able to avoid acting as a "super-arbitrator" in the parties' dispute. More importantly, the court was able to set forth a clearer test of when an arbitration award will be prospectively enforced. In this regard the court stated:

> Only where an arbitrable award is both clearly intended to have a prospective effect and there is no colorable basis for denying the applicability of the existing award to a dispute at hand, will a court order compliance with the award rather than require the parties to proceed anew through the contract grievance procedure. . . . As we recently said [in *Boston Shipping*], unless "it is beyond argument that there is no material factual difference between the new dispute and the one decided in the prior arbitration that would justify an arbitrator's [sic] reaching a different conclusion," the case must go to fresh arbitration rather than to the court for judicial enforcement.[30]

The *Derwin* court's "material factual identity" test is significant for two reasons. First, the *Derwin* test was extended to incidents rather than limited to identical boundary disputes as in *Boston Shipping*. Consequently, some factual deviation in subsequent disputes still qualifies for prospective enforcement. Second, the *Derwin* decision creates a smaller target that the plaintiff must hit in order to bring a successful claim. The prior award must not only be materially factually identical, it must also be issued prospectively. By refusing to enforce or confirm arbitration awards that are not given a prospective effect, the court avoids the problem of acting as a "super-arbitrator" and reinterpreting the initial arbitration award.

At the same time, however, the "material factual identity" test is not without its problems. The *Derwin* court's test is fraught with ambiguity. There is no definition of what constitutes a "colorable basis" for determining the applicability of a prior award, nor is there any definition of what constitutes a "material factual difference" between a new dispute and one formerly arbitrated.

In clarifying this terminology, the effect of the "material factual identity" test is unclear. The First Circuit will either be swamped with claims for prospective enforcement, or the parties will be reluctant to seek prospective enforcement, given *Derwin*'s small target and the expense of litigation.

One of the practical implications of the "material factual identity" test

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[30] *Derwin*, 719 F.2d at 491 (citations omitted).

is that it limits the likelihood that a union will seek prospective enforcement. If one assumes that most parties will adhere to the decision of an arbitration award, then it is unlikely that either party will violate the contract on precisely the same facts. If, however, the facts of subsequent disputes vary slightly from the prior awards, but the principles stated in the prior awards are substantially the same, then the parties will probably proceed to arbitration rather than seek prospective enforcement. While this may be viewed as a benefit by encouraging the parties to seek arbitration, it subjects the union to the expense of continual arbitration if the same contract clause is repeatedly violated in different employment contexts.

In addition, the test also puts the burden of awarding prospective relief on the arbitrator. If either a union or the company seeks prospective relief in an arbitral dispute, then the question is raised as to whether the arbitrator has jurisdiction to render such an award. Because the arbitrator is limited to the terms of the collective bargaining agreement, a plausible argument can be made that the arbitrator could exceed the scope of his authority by issuing an award that would extend to a future contract or dispute that does not yet exist.

B. *The Third Circuit and "Positive Assurance"*

In *United Mine Workers, District 5 v. Consolidation Coal Co.*,[31] the union sought to enforce a settlement agreement with the company whereby the company would agree to remove a subcontractor from one of its preparation plants and reassign the work to classified union employees. In *Consolidation Coal Co.*, the court stated:

> Federal courts are bound to exercise the utmost restraint to avoid intruding on the bargained-for method of dispute resolution and when enforcement of an arbitration award . . . is sought under Section 301 [of the Labor Management Relations Act], the court must be able to say "with positive assurance" that the award . . . was intended to cover the dispute. If the court has any doubt, the parties should be returned to their grievance procedure and arbitration, for it is an arbitrator, and not the court, who is to decide whether the same issue has already been resolved in an earlier proceeding.[32]

The "positive assurance" test was further clarified and refined in *Butler Armco Indep. Union v. Armco Inc.*[33] In *Butler*, the union sought an

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[31] 666 F.2d 806 (3d Cir. 1981).

[32] *Consolidation Coal Co.*, 666 F.2d at 811 (footnote omitted).

[33] 701 F.2d 253 (3d Cir. 1983) [hereinafter *Butler*].

injunction, and the district court held that the dispute was better suited for arbitration.[34] The Court of Appeals upheld the district court ruling, pointing out the fine line between re-arbitration and prospective enforcement:

> While the rule of deferring to arbitration is generally well-understood, problems arise in its application to a situation in which the action by one party in a particular matter is similar to an action that an arbitrator had previously ruled was prohibited by the collective bargaining agreement. If the court orders the parties to arbitrate the new matter, it runs the risk of reading the prior decision so narrowly that it becomes almost meaningless. On the other hand, by ruling that the prior decision controls the case then before it, the court may be arrogating to itself the role of contract interpreter which, under the *Steelworkers' Trilogy*, should be left, at least in the first instance, to the arbitrator.[35]

The court likewise cited Supreme Court authority for the positive assurance test:

> We do not believe that the union has asserted that it is seeking to enforce their terms of a prior arbitration award or settlement agreement. In such a situation, the standard the district court would apply in determining whether to enforce the initial award is whether it can be said "with positive assurance" that the award or settlement agreement is intended to cover the current dispute.[36]

The language of the Third Circuit's "positive assurance" test is derived from the *Steelworkers' Trilogy* case, *United Steelworkers v. Warrior & Gulf Navigation Co.*[37] In *Warrior & Gulf*, the Supreme Court held that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[38]

The Supreme Court's language, however, refers to arbitration clauses and the question of whether a labor dispute is arbitrable, not whether sufficient factual similarity between a current dispute and a prior arbitration award exists to enforce the arbitration award prospectively.

Consequently, the Third Circuit's "positive assurance" test is

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[34] *See* 701 F.2d 253 at 254.

[35] *Id.* at 255.

[36] *Id.* at 256 n.1 (quoting *Consolidation Coal Co.*, 666 F.2d at 811).

[37] 363 U.S. 574.

[38] *Warrior & Gulf*, 363 U.S. at 582-83.

misguided in its approach and goes beyond the meaning of the Supreme Court's language. Positive assurance may be an acceptable standard for questions of arbitrability, but it is an extremely vague and subjective standard to apply in cases of prospective enforcement. The reviewing court is required to determine not only whether the dispute is covered by the collective bargaining agreement, but also whether the prior arbitrator would have rendered an award in favor of the party seeking prospective enforcement. Inherent in this analysis is the requirement that the current dispute be sufficiently factually similar to the prior award to warrant prospective enforcement in the first place.

Another interesting variation on the "positive assurance" test arises in the Third Circuit case of *Local 103 of the Int'l Union of Elect., Radio and Machine Workers v. RCA Corp.*[39] In *RCA*, the district court addressed the question of whether an allegedly identical issue previously decided at arbitration could be prospectively enforced when the collective bargaining agreement contained a broad ban on re-arbitration of the same dispute.[40] In this case, the court of appeals held that the re-arbitration clause *itself* was a subject for arbitration. Thus, the dispute could not be resolved by the court.[41] The *RCA* court held:

> [I]t is for the arbitrator to evaluate the relevance and effect of the [prior] arbitration award and opinion; it is for him to decide whether it qualifies "in industrial common law," through "experience developed by reason and reason tried and tested by experience," as the "same question or issue" presented by the immediate grievance which therefore may not "be the subject of arbitration more than once."[42]

The *RCA* court obviously recognized the tension between prospective enforcement and upholding the policy of encouraging arbitration as stated in the *Steelworkers' Trilogy*.[43] However, the court fails to provide any real remedy by refusing to determine the impact of the re-arbitration clause on suits for prospective enforcement.

Perhaps the most unfortunate aspect of *RCA* is that the court could have used the re-arbitration issue to encourage the parties to negotiate the precedential and prospective effect of arbitration awards. In doing so, the court would have created an effective remedy and upheld the policy of promoting arbitration as a means of dispute resolution.

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[39] 516 F.2d 1336 (3d Cir. 1975).

[40] *Id.* at 1337.

[41] *Id.* at 1341.

[42] *Id.* at 1340-41 (footnote omitted).

[43] *Id.* at 1339.

Further, the *RCA* court would have eliminated all need for prospective enforcement by approving the re-arbitration clause. The *RCA* court and courts in the future would only have had to determine whether the arbitrator's award "drew its essence" from the collective bargaining agreement when the agreement contained a ban on re-arbitration of identical disputes. By refusing to make these determinations, however, the *RCA* court continued to promote many of the difficulties inherent in the Third Circuit's "positive assurance" test.

First, the "positive assurance" standard, like the First Circuit's "material factual identity" test, is extremely vague. More importantly, however, the determination of prospective enforcement turns upon the subjective determination of whether the court is "positively assured" and suggests a standard whereby the court can prospectively enforce an award on any grounds it finds compelling. The resulting problem is that the parties have no indication as to whether they will be able to successfully bring or defend a prospective enforcement claim.

The *RCA* court further states that if there is any doubt regarding the interpretation of the prior arbitration award, the court must resort to arbitration.[44] This analysis is problematic because it ignores the secondary problem of arbitration sought merely to frustrate the union's attempt to force the employee's compliance with the collective bargaining agreement. All the employer needs to do is raise some basis for doubting the interpretation of a prior award as applied to a current dispute, whatever the doubt may be, and the parties must re-arbitrate.

This last point is demonstrated in *RCA*, in which the court states that repeated arbitration will not result in a hollow formality;[45] rather, repeated arbitration encourages re-arbitration in situations where repeated violations occur. Such a policy ignores the situation of an employer refusing to abide by the collective bargaining agreement in good faith. Clearly, the imprecision of the Third Circuit's language and its inherent subjectivity make the "positive assurance" test most undesirable.

C. *The Fifth Circuit and "Substantially Similar" Arbitration Awards*

The most in-depth analysis of prospective enforcement of arbitration awards is *Oil, Chem. and Atomic Workers Int'l Union v. Ethyl Corp.*[46] In *Ethyl*, the union brought a grievance alleging a violation of the collective bargaining agreement when the company assigned an on-shift supervisor to

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[44] *RCA*, 516 F.2d at 1339.

[45] *See id.* at 1341. *See also Consolidation Coal Co.*, 666 F.2d 806, 811.

[46] 644 F.2d 1044 (5th Cir. 1981).

perform classified work.[47] The parties proceeded to arbitration. In rendering his award, the arbitrator issued a prospective remedy by "order[ing]" the company to "'desist from violation *such as that involved here*, . . . [and to] hereafter desist. . . from *like* violations.'"[48] The most important aspect of *Ethyl* is that the arbitrator issued his award prospectively. This allowed the court to fully address many of the issues discussed in this Article and to articulate one of the major difficulties with prospective enforcement:

> We must ensure that the prior arbitration award is not sidestepped and the process of arbitration thereby rendered futile, while simultaneously guarding against actually adjudicating the merits of a grievance made subject to arbitration by the collective bargaining agreement. Hence, we must devise a standard which enables us to assess whether the company is simply committing a "like violation" of the previous award, but which stops short of forcing us to reach a decision as to whether the current use of the supervisors actually violates [the collective bargaining agreement].[49]

From this point the *Ethyl* court formulated its test for enforcing an arbitration award issued prospectively:

> It seems logical that conduct which is substantially similar to the actions condemned in the prior arbitration award must be prohibited in order to properly enforce that award. Conduct which merely differs in form from the actions which were the subject of the prior arbitration award cannot serve as an excuse for instituting new arbitration proceedings. . . . In summary, the test of whether the current conduct is "substantially similar" to or, rephrased slightly, is "not materially different" from the conduct condemned in the previous arbitration award adequately protects the union from . . . sidestepping or subver[ting] of the prior arbitration award.[50]

In addition to the "substantially similar" test, the *Ethyl* court articulated the appropriate evidentiary standards to be used in prospective enforcement cases:

> [T]he plaintiff thus has the ultimate burden of proving that the disputed conduct falls, beyond argument, within the prohibition and outside the exceptions of the [collective bargaining agreement] . . . .

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[47] 644 F.2d 1044 at 1047.

[48] *Id.*

[49] *Id.* at 1050.

[50] *Id.*

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> If the plaintiff establishes that the current conduct inarguably falls within the prohibition [of the collective bargaining agreement] that was the subject of the previous arbitration award, the burden shifts to the defendant to articulate, through the presentation of evidence the reasons why the disputed conduct at least arguably falls within an express exception in, or is otherwise exempted from satisfying the mandates of, the relevant article of the bargaining agreement . . . . If the defendant is unable to articulate, through evidence, legitimate reasons why the disputed conduct is even arguably exempt from the prohibition [of the collective bargaining agreement], then the court can conclude that the present conduct is substantially or materially similar to the company's previous actions and thereby constitutes a "like" violation of the bargaining agreement as condemned in the prior arbitration award.[51]

Ethyl is by far the most analytical and definitive statement made by any court to date regarding prospective enforcement. However, the *Ethyl* court has still failed to address several important issues.

First, it is impossible to apply the prior arbitration award to the new dispute while interpreting the relevant provisions of the collective bargaining agreement. In the *Steelworkers' Trilogy*, the Supreme Court held that courts are not allowed to substitute their judgment for that of the arbitrators in determining the validity of an arbitration award.[52] In a prospective enforcement case, the *Ethyl* court and courts in other circuits are substituting the rubric of comparing fact patterns in arbitration awards for what is essentially contract interpretation.

For example, if a particular court decides the current dispute is similar to a prior prospective arbitration award, the unstated premise is that this type of conduct is either protected under the collective bargaining agreement or that the collective bargaining agreement prohibits that particular conduct. In either case, a court implementing the "substantially similar" test is effectively preempting arbitration by holding that the new dispute falls within the prohibitions of the previous arbitration award. Not only is the court indirectly interpreting the collective bargaining agreement, but the court is substituting its judgment for that of the arbitrator's by deciding that the prior arbitrator would reach the same result in the current dispute as in the prior award.

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[51] *Ethyl*, 644 F.2d at 1051–52 (footnotes omitted).

[52] *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

Finally, any court applying the "substantially similar" test would exceed the scope of the arbitrator's authority if the prior award was not *issued* prospectively, but the parties sought to bring a suit to *enforce* an award prospectively on the basis of a series of similar subsequent violations. For example, if an arbitrator issues a prospective award such as in *Ethyl* by prohibiting supervisors from performing bargain unit work, it is foreseeable that another dispute may arise involving substantially similar facts on prior occasions subsequent to the initial award. However, if in the dispute sought to be enforced, an arbitrator finds that the prior instances of allegedly prohibited conduct constituted a "past practice," not expressly stated in the parties' collective bargaining agreement, an arbitrator may reach a different result, even though the facts of the current dispute and prior award are substantially similar.[53]

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[53] In their treatise on arbitration, Elkouri and Elkouri state:

> Arbitrators have ruled both ways on the question of whether, in the absence of contract provisions to the contrary, management has the right to assign bargaining unit work to employees outside the unit . . . . [w]here there [is] no specific contract restriction and management acted in good faith in assigning the work to non-unit employees, other arbitrators have emphasized in varying degrees certain consideration or justifying circumstances in upholding management's action. Included among such considerations or circumstances are the following fact situations:
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> 1. The quantity of work of the effect on the bargaining unit is minor or de minimus in nature.
> 2. The work is supervisory or managerial in nature.
> 3. The work assignment is a temporary one for a special purpose or need.
> 4. The work is not covered by the contract.
> 5. The work is experimental.
> 6. Under past practice the work has not been performed exclusively by bargaining unit employees.
> 7. There is a change in the character of the work.
> 8. Automation or a technological change is involved. Removal of accounting, payroll, billing, time keeping, and other clerical work from the bargaining unit upon establishment of centralized electronic data processing programs has been upheld in numerous cases. In one such case the arbitrator stated that "utilization of computer technology have become very common in American business practice . . . ."
> 9. An emergency is involved.
> 10. Some other special situation or need is involved.

FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 547–48 (4th ed. 1985) (footnotes omitted).

But even if one assumes a reviewing court is familiar with the concept of past practice and the circumstances in which it would apply, the court may still decide the allegedly prohibited conduct is substantially similar to the prior arbitrator award.

In another example, an arbitrator may find that although the current dispute and prior award are substantially similar, a technological change in production requires a change in employee job classifications. Consequently, a supervisor was required to perform what was formerly bargaining unit work. Clearly, these examples indicate that a court applying the "substantial similarity" test can, in some instances, circumvent the arbitral process.

In addition to the foregoing, the "substantially similar" test ignores the therapeutic value of arbitration as previously stated.[54] The *Steelworkers' Trilogy* acknowledged that arbitration may have benefits beyond mere adjudicating by allowing the parties to air their grievances immediately and thereby maintain industrial stability.[55] If one accepts the premise that some contract violations are inadvertent or due to differences of contract interpretation, a court willing to prospectively enforce every contract violation "substantially similar" to a prior award may ultimately frustrate the arbitration process and promote tension between the employer and the union. An overzealous union seeking to prospectively enforce a prior arbitration award and forcing the employer into litigation will obviously increase union animus. The counter-argument is that if a union suffers repeated violations of the same arbitration award, re-arbitration will have little therapeutic value, if any.

Another major difficulty with the "substantially similar" test stems from the procedural posture of *Ethyl*. Because the prior award had already been issued "prospectively," the *Ethyl* court was not forced to address the question of whether the prior arbitration award *should* have been issued prospectively. *Ethyl* provides no insight as to whether a prior arbitration award would have been prospectively enforced by the court of appeals had the arbitrator not previously ordered a prospective remedy.[56]

Similarly, the First and Third Circuits have not addressed the issue of

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[54] *See supra* text accompanying note 9.

[55] United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

[56] It is important to note that the focus of this Article is on the tests articulated for arbitration awards that have not been issued prospectively and whether the federal courts can enforce the same. Another reason the enforceability of prospectively issued arbitration awards is not considered here is because such suits would in essence constitute suits to confirm arbitration awards rather than prospectively enforce them. The only inquiry necessary for any federal court reviewing a prospectively enforced arbitration award would be whether the arbitrator's award "draws its essence" from the collective bargaining agreement.

whether an arbitration award adjudicating a single dispute should be given a prospective effect. The First Circuit in *Derwin* vaguely states that in the later dispute, prospective enforcement must be given.[57]

In the Third Circuit, however, the "positive assurance" test seems to require that the prior arbitration award must first be issued prospectively.[58] If the prior award is not prospective, then a court asked to prospectively enforce the award could not say with "positive assurance" that the award was intended to govern the asserted dispute.[59]

Regarding the Fifth Circuit, the language in *Ethyl* implies that the court must first have some basis for enforcing an award prospectively. In *Ethyl*, the court held:

> An arbitrator's award which would have merely instructed Ethyl not to use a supervisor named Johansan in the railway yard in the manner he was used during two shifts three years earlier -- an award which would have merely reminded the company of a faded memory and proceeded to order that the memory be forgotten forever - would have been a totally useless remedy for the Union. In fact, the only effect of such an award would have been to demonstrate the folly of seeking to enforce . . . the collective bargaining agreement: . . . the Union would merely be provided with the opportunity to correct a wrong in the annals of the Ethyl Corporation.[60]

The Fifth Circuit recognized the obvious futility of an arbitration award so specific that it fails to provide any remedial effect. In contrast, the *Ethyl* court overly narrows the issue by discussing the effect of an award limited to "supervisors named Johansan."[61] The more difficult, and heretofore unresolved, question is whether an arbitration award, which prohibits supervisors from performing non-bargaining unit work, and is not issued prospectively, can in fact still be prospectively enforced. Although the Fifth Circuit leaves that issue unresolved in *Ethyl*, the issue is more fully addressed by the Seventh Circuit.

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[57] *Derwin*, 719 F.2d at 491.

[58] United Mine Workers of America, District 5 v. Consolidation Coal Co., 666 F.2d 806, 811 (3d Cir. 1981).

[59] *See id.*

[60] 644 F.2d at 1048.

[61] *Id.*

D. *The Seventh Circuit and "Strict Factual Identity"*

United Elect., Radio, and Mach. Workers v. Honeywell, Inc.[62] is the most important case in the Seventh Circuit. The most unique aspect of *Honeywell* is that the prospective nature of this case is based upon the precedent of four prior arbitration awards, as opposed to a single prior arbitration award, being enforced prospectively.

In *Honeywell*, the union brought an action for violation of a collective bargaining agreement.[63] The union's complaint alleged that four prior arbitration awards issued in 1973 prohibited the company from assigning classified bargaining unit work to supervisory personnel.[64] The union further claimed that the company had failed to comply with the meaning and effect of the arbitration awards by violating the same contract provisions formerly arbitrated in subsequent cases.[65]

The union brought suit seeking the prospective enforcement of the four arbitration awards issued in 1973. The *Honeywell* court recognized the uniqueness of this type of claim for relief:

> While there are numerous reported cases of parties seeking to force or enjoin arbitration or to enforce an arbitration award, it is most unusual to find a party seeking the right to bypass arbitration procedures which it is contractually bound to follow and which are concededly applicable to the particular incidents generating disputes. Although we do not foreclose the possibility that there might exist particularly egregious circumstances which, if alleged, might state a cause of action for relief from a contractual duty to arbitrate, it is our opinion that the allegations of the complaint before us are not sufficient to state such a cause of action.[66]

Although the *Honeywell* court stated at the outset of the case that the union would not prevail, the court continued its analysis.[67] The court first held that in order for a union to bring a claim for prospective enforcement, the following prerequisites must be met: (1) the union must first aggregate its grievances in a single arbitration proceeding; (2) the union must request declaratory or injunctive relief at arbitration; and (3) the prior arbitration awards issued in the union's favor must be substantially identical to the

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[62] 522 F.2d 1221 (7th Cir. 1975).

[63] *Id.* at 1222–23.

[64] *Id.* at 1223–24.

[65] *Id.* at 1224.

[66] *Honeywell*, 522 F.2d at 1225.

[67] *See id.* at 1225–28.

facts in those grievances which have not yet been presented for arbitration.[68] In *Honeywell*, the union failed to submit any evidence that the arbitration awards were issued prospectively or to inform the court of the similarity of the facts to the grievances sought to be enforced.[69]

Although the *Honeywell* court recognized the need for arbitrators to be flexible in fashioning the appropriate remedy in labor disputes, the court also held that similar judicial decisions, whereby the court would decide what type of remedy would be most appropriate, were beyond the scope of its review.[70]

In essence, the prospective enforcement test of *Honeywell* holds that in order for the union to bring a claim for prospective enforcement, the union must present evidence that the company is persistently and willfully disregarding the prior arbitration awards.[71] However, even assuming the awards were willfully and persistently violated, the union must still show the "strict factual identity" between the prior awards and the subsequent violations in order to receive prospective relief.[72] The court's inquiry into the prior conduct of the employer is the most important benefit of *Honeywell*. By examining the parties' past relationship, the court is able to fashion a more appropriate form of relief without intruding into the arbitrator's domain or surreptitiously interpreting the collective bargaining agreement. This aspect is crucial in establishing a workable prospective enforcement test.

The *Honeywell* court also addressed and subsequently rejected the notion of res judicata in the arbitral setting. The court held:

> The union contends that the arbitration awards constitute interpretations of the collective bargaining agreement with a sort of *res judicata* [sic] effect which make arbitration of the remaining grievances unnecessary. But notions of *res judicata* [sic] are less suited to the informal process of industrial arbitration than to the litigation process, and, to the extent that *res judicata* [sic] has been used in arbitration, a strict factual identity has been required. . . . [I]n the instant case, the arbitration of four subcontracting disputes in which it was determined that particular work assignments violated the contract, does not foreclose an arbitrator's independent application of the same contractual language to other

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[68] *See Honeywell*, 522 F.2d at 1226.

[69] *Id.*

[70] *Id.*

[71] *See id.* at 1228.

[72] *See id.*

situations.[73]

The *Honeywell* decision is not just another variation on the prospective enforcement theme. Numerous problems exist with the "strict factual identity" test. Although some of the shortcomings of the "strict factual identity" test stem from the facts of the *Honeywell* case, there are conceptual problems with the test as well.

The language of the "strict factual identity" test lacks any real meaning. The *Honeywell* court gives no explanation as to when a suit for prospective enforcement is sufficiently identical to warrant enforcement of a prior arbitration award. Without any indication as to what facts are necessary to constitute strict factual identity, the test as articulated in *Honeywell* is so vague it is meaningless.

The court of appeals in *Ethyl* states an additional criticism of the *Honeywell* "strict factual identity" test. In this regard, the *Ethyl* court commented as follows:

> [R]eliance on the term "strict factual identity" to identify those grievances which need not be submitted to arbitration has no greater appeal in logic than the use of such terms as "semi-strict factual identity," "semi-loose factual identity," or "loose factual identity." None of these terms serves to identify the set of grievances which logically should be judicially enforced from those which should be resolved by arbitration.[74]

The Fifth Circuit's criticism of *Honeywell* is indicative not only of the extent of disagreement among the federal circuits, but also the complexity of the prospective enforcement issue as well. An empirical analysis of the various prospective enforcement tests developed by the federal courts leads to the following generalized conclusions.

First, each prospective enforcement test requires that the court broaden its powers of judicial review by implicitly substituting its judgment for that of the arbitrator. Stated differently, each test assumes that the arbitrator would examine the facts in the same manner as the court and would reach the same result in the prior arbitration award. In every circuit under every test, if the court fails to make such an assumption, a party bringing suit for prospective enforcement would never succeed.

In addition, this type of comparative factual analysis ignores the initial basis for judicial review.[75] The threshold issue is limited only to whether

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[73] *Honeywell*, 522 F.2d at 1228.

[74] *Ethyl*, 644 F.2d at 1055.

[75] *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597

the arbitrator's award "draws its essence" from the collective bargaining agreement; if so, the court's judicial review is at an end.[76] By enforcing an award prospectively, the court inevitably circumvents the arbitration process by deciding that a current dispute is "substantially similar," "materially factually identical" or by finding that it is "positively assured" that the current dispute is similar to a prior dispute. Consequently, the courts exceed their scope of authority because there is never an opportunity for the parties to proceed to arbitration. Obviously, a court cannot determine whether the arbitrator's award "draws its essence" from the collective bargaining agreement because there is neither a dispute to arbitrate nor an award rendered.

Second, each test is vague. There is no precision in the phrase "materially factually identical," "positive assurance" or "strict factual identity." Without accurate standards and a context in which a prospective award could and should be applied, it is impossible for any party to bring suit seeking prospective enforcement. If anything, the ambiguous language will have a chilling effect on parties with valid claims for prospective enforcement, because no specific or objective basis exists by which to measure the merits of a particular claim.

Third, no test in any circuit distinguishes between good faith contract violations and those violations committed in bad faith. For example, it is conceivable that a good faith violation would occur when an employer violates a collective bargaining agreement by breaching some provision due to a different interpretation or misunderstanding of the contract terms. It is equally conceivable that a bad faith violation would occur when an employer purposely and willfully attempts to violate a collective bargaining agreement in order to flood the grievance system, frustrate the arbitration process or possibly reinstate some workplace practice formerly lost in the contract negotiations.

Given these three main problem areas, a new test is needed. The authors of this Article submit that the concept of prospective enforcement should not be viewed as another claim brought by the parties, but rather as an alternative remedy available only when one of the parties is violating the contract in bad faith. In the words of *Honeywell*, the employer must "willfully" and "persistently" violate the collective bargaining agreement.[77] Viewed in this manner, the concept of prospective enforcement will tend to promote industrial stability and the use of the arbitration process, rather than detract from it.

(1960).

[76] *See Enterprise Wheel & Car Corp.*, 363 U.S. at 599. *See also* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

[77] *Honeywell*, 522 F.2d at 1225.

Given the assumption that prospective enforcement should be seen as a remedial measure for bad faith contract violations, a close analogy can be drawn from those court decisions that have issued prospective injunctions against labor strikes. Although a labor strike and a prospective enforced arbitration award may appear to have little in common, an arbitration award enforced prospectively does nothing more than prohibit future similar violations of the collective bargaining agreement.

A permanent injunction prohibiting a labor strike, when committed in violation of a collective bargaining agreement, does exactly the same thing as a prospective arbitration award. The injunction protects against future similar violations of the collective bargaining agreement.

Proceeding from this premise, the standard for issuing a permanent or prospective injunction can be applied, with some modifications, to suits for prospective enforcement. First, some background regarding prospective injunctions is warranted.

IV. BACKGROUND OF PERMANENT AND PROSPECTIVE INJUNCTIONS WITHIN THE CONTEXT OF *BOYS MARKETS*

A. *Reconciling Norris-LaGuardia and Taft-Hartley*

The Supreme Court's decision in *Boys Markets v. Retail Clerks Union*,[78] was intended to reconcile the Norris-LaGuardia Act[79] and the Labor Management Relations Act ("Taft-Hartley Act"). [80]

The purpose of the Norris-LaGuardia Act is to prevent federal judges from prohibiting strikes by ordering broad injunctions.[81] In *Textile Workers Union v. Lincoln Mills*,[82] the Supreme Court determined that not only did the Taft-Hartley Act authorize federal courts to fashion a substantive body of labor law, but also that arbitration is a favored method of settling labor disputes.

Under *Lincoln Mills*, the federal courts were allowed to order an employer to arbitrate.[83] This was not considered a prohibitive injunction under the Norris-LaGuardia Act because a refusal to arbitrate was not

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[78] 398 U.S. 235 (1970), *overruled in part by* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

[79] 29 U.S.C. §§ 101-15 (1970).

[80] 29 U.S.C. §§141-97 (1988).

[81] *See* United States Steel Corp. v. United Mine Workers, 519 F.2d 1236, 1242 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976) [hereinafter *Steel I*].

[82] 353 U.S. 448 (1957).

[83] *Id.* at 451.

"part . . . of the abuses against which the Act was aimed."[84] The Supreme Court reasoned that a union no-strike clause within the Lincoln-Mills collective bargaining agreement was the quid pro quo for an arbitration clause.[85] This quid pro quo rationale was extended in *Local 174, Teamsters v. Lucas Flour Co.*,[86] in which the court decided that the existence of an arbitration clause implied a no-strike obligation over arbitrable issues.

Later, in *Sinclair Ref. Co. v. Atkinson*, the Supreme Court held that the anti-injunction provisions of the Norris-LaGuardia Act precluded a federal district court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement.[87]

Subsequent to *Sinclair*, the Supreme Court held, in *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*,[88] that Section 301(a) suits initially brought in state courts could be removed to a federal forum under federal question jurisdiction.

The practical effect of *Avco* and *Sinclair* is to "oust state courts of jurisdiction in Section 301 suits where injunctive relief is sought for breach of no-strike obligation."[89] The Supreme Court realized that union defendants would be able to remove suits to federal court where it would be more difficult for plaintiff-employers to obtain injunctive relief. The court's decision in *Boys Markets* recognized that the *Sinclair* and *Avco* decisions: (1) encroached upon state court jurisdiction, and (2) seriously offended federal labor policy.[90]

Thus, by adopting the *Sinclair* dissent in *Boys Markets*, the Supreme Court attempted to reconcile two statutorily created federal policies: (1) the Norris-LaGuardia prohibitions against injunctions in labor disputes, and (2) the policy favoring the peaceful resolution of Section 301 labor disputes through arbitration.

The reconciliation in *Boys Markets* amounted to a very narrow exception to the Norris-LaGuardia Act. The Supreme Court stated:

> Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in

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[84] *Lincoln Mills*, 353 U.S. at 458.

[85] *Id.* at 455.

[86] 369 U.S. 95 (1962).

[87] 370 U.S. 195, 203 (1962), *overruled in part by Boys Markets*, 398 U.S. 235 (1970).

[88] 390 U.S. 557, 560 (1968).

[89] *Boys Markets*, 398 U.S. at 244-45.

[90] *Id.* at 245-46.

> every case of a strike over an arbitrable grievance. The dissenting opinion in *Sinclair* suggested the following principles for the guidance of the district courts in determining whether to grant injunctive relief—principles that we now adopt. . . .[91]

The general principles of the *Sinclair* dissent adopted in *Boys Markets* are as follows:

> 1) The strike is over a grievance which both parties are contractually bound to arbitrate;
> 2) the company had previously demanded that the dispute be submitted to arbitration;
> 3) the collective bargaining agreement contains a (no-strike) clause; and
> 4) the issuance of the injunction is necessary to prevent irreparable injury to the plaintiff and this injury is greater than any hardship to the defendant.[92]

In *Gateway Coal Co. v. United Mine Workers*,[93] the Supreme Court clarified *Boys Markets* and furthered the *Sinclair* dissent by holding that there is a presumption of arbitrability which is applicable to both parties in a collective bargaining agreement. The Supreme Court stated that "[t]he 'presumption of arbitrability' announced in the *Steelworkers' Trilogy* applies to safety disputes, and that the dispute in the instant case is covered by the arbitration clause in the parties' collective-bargaining agreement."[94]

The end result of *Boys Markets* and *Gateway* is to allow federal courts to grant injunctions against unions that have gone on strike directly in the face of an express or implied no-strike clause in the parties' collective bargaining agreement.

The next logical step is to determine the scope of the *Boys Markets* injunction. In most instances, federal courts have enjoined union strikes and ordered the parties to arbitrate the particular disputes in question. In other instances, the federal courts have issued prospective and permanent injunctions against a union on strike as well.[95]

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[91] *Boys Markets*, 398 U.S. at 253–54.

[92] *See id.* at 254-55 (quoting *Sinclair*, 370 U.S. at 228 (dissenting opinion)).

[93] 414 U.S. 368, 377–79 (1974).

[94] *Id.* at 379-80.

[95] Note that the term "prospective" is used interchangeably with "permanent" in various federal circuits. There is no substantive difference. In the interests of consistency and clarity, the term "prospective" will be used in this text.

B. *Overview of Prospective Injunctions Within the Context of* Boys Markets

In order to issue any injunction, the court must first decide if the issuance of the injunction meets the requirements as stated in *Boys Markets*. Upon meeting these standards, the federal court will then consider the availability of a prospective injunction.

While no specific requirements must be met in order to issue a prospective injunction, the courts will generally consider (1) the number and pattern of illegal work stoppages in the past, (2) the union's proclivity to strike, and (3) the possibility of similar strikes in the near future. According to *Boys Markets,* the rationale behind the permanent or prospective injunction is to limit the "irreparable injury" sustained by an employer during a union strike.[96]

On the other hand, the courts will also consider such factors as vagueness, overbreadth, and lack of specificity of the injunction, as required by Federal Rule of Civil Procedure 65(d), before issuing a prospective injunction. Usually these factors outweigh the court's concern regarding the union's proclivity to strike and the possibility of future union strikes. In addition, the Court in *Boys Markets* concluded that the decision to enjoin any strike must be made on a case-by-case basis.[97]

Further, many courts have reasoned that the strike must be over an arbitrable issue as a condition precedent to enjoining the strike. In *United States Steel Corp. v. United Mine Workers*,[98] the court stated that "*Boys Markets* contemplates a finding in each case that the strike was over an arbitrable issue as a condition precedent to issuance of an injunction."[99] Thus, a prospective injunction is often precluded on these grounds as well.

Keeping this brief overview in mind, the next step is to examine the decisions, policies and rationales of the federal district and circuit courts.

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[96] *Boys Markets*, 398 U.S. at 250.

[97] *Id.* at 253-54.

[98] 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976) [hereinafter *Steel I*].

[99] *Steel I*, 519 F.2d at 1245.

C. *Lower Court Opinions*

1. *Opposite Ends of the Spectrum: The Fifth and Seventh Circuits*

a. *The Seventh Circuit*

The Seventh Circuit is one of two circuits, the other being the Tenth Circuit, that has allowed the issuance of prospective "*Boys Markets*" injunctions in labor cases. In *Old Ben Coal Corp. v. Local 1487, United Mine Workers*,[100] the court of appeals modified the district court's order for a permanent injunction. The district court reasoned that Local 1487's repetitive work stoppages warranted a prospective injunction over future strikes.[101] The appellate court modified the district court's ruling by stating: "Were it not for the cautious approach which the existence of the Norris-LaGuardia Act requires in this area, a broad injunction, making contempt remedies available as to future similar instances, may well have been within the sound discretion of the court."[102]

The court went on to state that any future proclivity by the union could result in a broader injunction: "Perhaps a broad injunction would be appropriate in some future action should it appear that the [u]nion is unwilling to accept the present adjudication with respect to its rights."[103]

Later, in *Old Ben Coal Corp. v. Local 1487, United Mine Workers*,[104] the United States Court of Appeals for the Seventh Circuit again heard an appeal by Local 1487 from the district court's order for a permanent injunction.

In *Old Ben II*, the appellate court affirmed the district court's permanent injunction. The appellate court reasoned that the court's dicta in *Old Ben I* amounted to a warning against Local 1487 not to strike. The union argued that the warning was unclear at best and that a permanent injunction was not warranted under the Norris-LaGuardia Act. The appellate court held to the contrary: "In *Old Ben I* we *admonished* the union that: 'Perhaps a broad injunction would be appropriate . . . .'"[105]

The court's rationale was that the Norris-LaGuardia Act allowed the breadth of an injunction to be determined by the extent of the

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[100] 457 F.2d 162, 165 (7th Cir. 1972) [hereinafter *Old Ben I*].

[101] *Id.*

[102] *Old Ben I*, 457 F.2d at 165.

[103] *Id.*

[104] 500 F.2d 950 (7th Cir. 1974) [hereinafter *Old Ben II*].

[105] *Id.* at 953 (emphasis added).

misconduct.[106] However, the court cites no basis in either the Norris-LaGuardia Act or *Boys Markets* to support its contention.

The court also noted the irreparable injury sustained by the Old Ben Coal Company: "Old Ben Coal has suffered heavy losses. Any remedy therefore less than a permanent injunction is inadequate."[107]

The second decision within the Seventh Circuit that granted a permanent injunction was *Peabody Coal Co. v. Local 1670, United Mine Workers*.[108] The district court determined that Peabody had suffered irreparable injury and also that: "[I]n view of the repeated strikes in violation of the [c]ontract, the court is of the opinion that unless a permanent injunction is issued, such strikes will continue and that a permanent injunction is appropriate despite the provisions of the Norris-LaGuardia Act."[109]

The only other court to issue a permanent injunction was the Court of Appeals for the Tenth Circuit in *C.F. & I. Steel Corp. v. United Mine Workers*.[110] The court stated:

> The Supreme Court's standards for judging the permissible breadth of injunctions are found in *NLRB v. Express Publishing Co.:* It is there held that:
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> "The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. . . . To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."[111]

Although *C.F.& I.* relied heavily on *Express Publishing*, the latter is easily distinguished. In *Express Publishing*, the Supreme Court stated that some injunctive relief is allowed in order to prevent future violations of the

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[106] *Old Ben II*, 500 F.2d at 953.

[107] *Id.*

[108] 416 F. Supp. 485 (E.D. Ill. 1976).

[109] *Id.* at 495.

[110] 507 F.2d 170 (10th Cir. 1974).

[111] *C.F. & I*, 507 F.2d at 174 (citiation omitted)(footnote omitted) (quoting NLRB v. Express Publishing Co., 312 U.S. 426, 436-37 (1941).

law.[112] However, *Express Publishing* lends no support to a Section 301 injunction because it involves a suit by a government agency to enforce a statutory policy. In this case, injunctive relief is expressly authorized by statute and is not subject to the strictures of the Norris-LaGuardia Act.

b. *The Fifth Circuit*

At the opposite end of the spectrum, the courts within the Fifth Circuit are strongly opposed to issuing permanent injunctions. Generally, the Fifth Circuit recognizes three prerequisites to the federal court's ability to enjoin a strike:

> In attempting to accommodate "[t]he literal terms of Section 4 of the Norris-LaGuardia Act . . . to the subsequently enacted provisions of [Section] 301(a) of the Labor Management Relations Act and the purposes of arbitration," the Supreme Court in *Boys Markets* established three prerequisites to jurisdiction in federal district court to enjoin a strike: (1) the strike must be in breach of a no-strike obligation under an effective collective agreement, (2) the strike must be "over" an arbitrable grievance, and (3) both parties must be contractually bound [express or implied] to arbitrate the underlying grievance which caused the strike.[113]

At the same time, however, the Fifth Circuit emphasized the narrowness of the *Boys Markets* exception. In *Amstar Corp. v. Amalgamated Meat Cutters*,[114] the court stated:

> The *Boys Markets* holding was a "narrow one," not intended to undermine the vitality of the anti-injunction provision of the Norris-LaGuardia Act. Indeed, the Supreme Court specifically stated that is [sic] decision did not mean "that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance."[115]

In *Steel I*,[116] the court echoed *Amstar*'s rationale. The court held:

> The district court's order . . . was nothing less than an injunction against

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[112] *Express Publishing*, 312 U.S. at 437.

[113] Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372, 1373 (5th Cir. 1972) (footnote omitted).

[114] 468 F.2d 1372.

[115] *Id.* at 1373–74 (footnote omitted).

[116] 519 F.2d at 1236.

> striking for the life of the contract -- an order to work every day. Such overbroad use of the injunction is the very evil Norris-LaGuardia sought to remedy. It is not every strike which is enjoinable under *Boys Markets*, nor even every strike over an arbitrable issue.[117]

The Fifth Circuit underscored its reluctance to issue a prospective injunction by maintaining that *Boys Markets* injunctions can only be made on a case-by-case basis: "The carefully drawn guidelines in *Boys Markets* clearly call for case-by-case adjudication."[118] In *Steel I*, the court reasoned that it is impossible to issue a permanent injunction because the issue of the dispute's arbitrability is a condition precedent to granting a permanent injunction.[119]

Courts within the Fifth Circuit are also sensitive to granting an injunction "couched" in the terms of the agreement.[120] In *Steel I*, the court stated that when a prayer for injunctive relief is as broad as the clause in the collective bargaining agreement, it will not uphold a permanent injunction:

> We have not overlooked the fact that the order was couched in the exact words of the contract arbitration clause. Section 9 of the Norris-LaGuardia Act, however, requires that a labor injunction contain "only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court . . . ." 29 U.S.C. § 109 (1970). Here, no *specific* act is complained of in the motion for the amended preliminary injunction, nor prohibited in the injunction. Such an injunction cannot stand.[121]

The Fifth Circuit is also reluctant to issue a prospective injunction because the union is subject to contempt sanctions if an additional strike occurs. A permanent injunction provides the employer with too much protection. If the employer refuses to arbitrate, the union is left without any remedy to resolve the grievance.

In *Steel I*, a series of strikes precipitated an action by the employer for a permanent injunction.[122] The dispute concerned mine safety, seniority,

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[117] 519 F.2d at 1245.

[118] *Id.*

[119] *Id.* at 1244.

[120] *See id.* at 1245. *See also*, United States Steel v. United Mine Workers, District 20, 598 F.2d 363, 369 (5th Cir. 1979); Drummond Co. v. District 20, United Mine Workers, 598 F.2d 381, 385 (5th Cir. 1979).

[121] *Steel I*, 519 F.2d at 1245-46 (citations omitted).

[122] *Id.*

and the filling of job vacancies. The *Steel I* court held, *inter alia*, that: "In this case the effect of the district court's order is a determination that any strike would violate his order. This position forced the union to litigate the applicability of *Boys Markets* in a contempt proceeding, a situation strongly reminiscent of 'government by injunction.'"[123]

The "contempt proceeding" rationale is reinforced by the Fifth Circuit's reasoning that a permanent injunction is also precluded by Federal Rule of Civil Procedure 65(d):

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not be reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.[124]

In *Steel I*,[125] the court adopted the Supreme Court's decision in *International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n.*[126] The *Steel I* court stated:

> [In *Longshoremen's*] [t]he Supreme Court reversed, relying on Rule 65(d), because it was unclear from the [district court's prior injunctive] order whether it applied to [the *Longshoremen's*] second strike. The Court said: "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid."[127]

Cases from other circuits have been decided on similar grounds.[128]

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[123] *Steel I*, 519 F.2d at 1245-46.

[124] FED. R. CIV. P. 65(d).

[125] 519 F.2d 1246.

[126] 389 U.S. 64 (1967)[hereinafter *Longshoremen's*].

[127] 519 F.2d at 1246 (quoting *Longshoremen's* 389 U.S. at 76).

[128] *See* Pittsburgh-Des Moines Steel Co. v. United Steelworkers, 633 F.2d 302, 310 (3d Cir. 1980); Latas Libby's, Inc. v. United Steelworkers, 609 F.2d 25, 32 n.10 (1st Cir. 1979); United States Steel Corp. v. United Mine Workers, 534 F.2d 1063, 1078 (3d Cir. 1976).

Typically, these decisions limit an injunction to enjoining the union from striking over the dispute in question. However, a court will occasionally enjoin the union from striking in the future over similar disputes.

2. *The Middle Ground: District Court Decisions in Various Circuits*

The most common rationale for the decision not to enforce a permanent injunction is that a sufficient pattern of strikes that will justify the issuance of an injunction has not been shown.

This reasoning was adopted by the Third Circuit in *Bituminous Coal Operators' Ass'n v. United Mine Workers.*[129] The court stated: "Section 9 and Rule 65(d) of the Federal Rules of Civil Procedure require that the injunction be limited to the likely recurrence of violations of the same nature as those which already have been adjudicated."[130] This reasoning was echoed by the U.S. District Court for the Southern District of New York: "[A]ny prospective injunction must be confined to the same types of violations of the no-strike pledge that have occurred in the past and are likely to occur in the future."[131]

In *United States Steel Corp. v. United Mine Workers,*[132] the court stated: "[W]e agree with the district court that in a Section 301 suit a federal court may enjoin prospectively a pattern of contract violations, but we hold that in this instance the injunction was both overbroad and insufficiently specific."[133]

The second reason for not enforcing a permanent injunction is that the scope of the injunction is vague and oversteps the limitations of the Norris-LaGuardia Act. Various courts reasoned that a prospective injunction should not be issued since the courts are unable to prospectively anticipate the nature of the underlying dispute causing the strike. Without knowing what a future dispute may concern, the courts find it inherently unjust to enjoin a union from striking in the future.[134]

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[129] 585 F.2d 586 (3d Cir. 1978).

[130] *Id.* at 599.

[131] Dannon Co. v. Whelan, 555 F. Supp. 361, 365 (S.D.N.Y. 1983).

[132] 534 F.2d 1063 (3d Cir. 1976) [hereinafter *Steel II*].

[133] *Id.* at 1078. *See also,* United Parcel Service (New York) v. Local 804, Int'l Brotherhood of Teamsters, 698 F.2d 100, 110 (2d Cir. 1983); Drummond Co. v. District 20, United Mine Workers, 598 F.2d 381, 387 (5th Cir. 1979); Donovan Constr. Co. of Minnesota v. Construction, Prod. & Maintenance Laborers Union Local 383, 533 F.2d 481, 488 (9th Cir. 1976).

[134] *See, e.g., United Parcel Service,* 698 F.2d 100; United States v. Pittsburgh Trade Exchange, Inc., 644 F.2d 302 (3d Cir. 1981); Bituminous Coal Operators' Ass'n. v. United

In *Donovan Constr. Co. of Minnesota v. Construction, Prod. & Maintenance Laborers Local 383*,[135] the court stated:

> If the scope of the injunction is so broad as to enjoin union activity in situations that the court *could not have found* to be suitable for *Boys Markets* relief, because of the paucity of factual support for the necessary findings, the injunction crosses the jurisdictional boundary of the Norris-LaGuardia Act. We believe that the injunction here crossed that boundary.[136]

Some of the courts buttress their decisions with similar reasoning adopted from the Fifth Circuit. One such case is *Steel II*.[137] In regard to the strictures of Rule 65(d), the court stated:

> We believe that Rule 65(d) requires that something more be done in this case. . . . It seems to us that any prospective injunctive decree must tell the local what specific steps it must take to prevent illegal work stoppages from recurring and must tell the parent organization what prophylactic steps it must take to assure that the local fulfills its contractual obligation.[138]

The *Steel II* court also noted the disadvantage of a union being placed in a contempt situation if the court were to issue an injunction as broad as the arbitration clause itself: "A blanket injunction in the language of the arbitration clause places in the hands of the successful Section 301 plaintiff a weapon by which harassment by contempt citations may take the place of the normal ongoing collective bargaining process. No Section 301 defendant should be subjected to that risk."[139]

Finally, the court in *Latas Libby's, Inc. v. United Steel Workers*[140] echoed a similar sentiment:

> The harassment value to a successful plaintiff of an injunction such as the one issued by the district court below is considerable. The

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Mine Workers, 585 F.2d 586 (3d Cir. 1978); *Steel II*, 534 F.2d 1063 (3d Cir. 1976); New York Tel. v. Communications Workers, 445 F.2d 39 (2d Cir. 1971).

[135] 533 F.2d 481 (9th Cir. 1976).

[136] *Id.* at 485-86.

[137] 534 F.2d 1063.

[138] *Steel II*, 534 F.2d at 1077-78.

[139] *Id.* at 1078.

[140] 609 F.2d 25 (1st Cir. 1979).

> union should not be placed in a position of having to defend against contempt sanctions as a result of *any* strike against the [c]ompany in the future, under this or subsequent agreements.[141]

Clearly, the foregoing represents a broad spectrum of judicial decisions regarding prospective injunctions. However, it is possible to discern several common themes among seemingly individual cases and incorporate these themes into a generalized prospective injunction test. It is from this prospective injunction test that the prospective enforcement test is ultimately derived.

V. A SOLUTION TO THE PROSPECTIVE ENFORCEMENT OF PRIOR ARBITRATION AWARDS BASED UPON THE PROSPECTIVE INJUNCTION MODEL

A. *Similarities Between Prospective Injunctions and Prospective Enforcement of Arbitration Awards*

In summary, federal courts are very reluctant to issue either permanent or prospective injunctions against a striking union. As stated previously, the courts will decline to issue a permanent injunction based upon one or more of the following grounds:

1) The lack of specificity in the injunction as required by Federal Rule of Civil Procedure 65(d);

2) The employer's failure to show irreparable injury or a specific pattern of prohibited strike activity;

3) An injunction order that is vague, overbroad, or oversteps the boundaries of a *Boys Markets* injunction;

4) When the issuance of a prospective injunction would place the defendant union in a contempt situation;

5) When the issuance of an injunction would fail to preserve labor dispute arbitration and adjudication on a case-by-case basis.

Once a court is satisfied that a *Boys Markets* injunction should be issued, a prospective injunction will be issued when:

1) Several prohibited labor strikes or work stoppages or both have occurred;

2) The illegal work stoppages or prohibited strikes, or both, have a similar pattern or basis in fact;

3) The union has demonstrated a proclivity to strike;

4) There is a likelihood of similar strikes in the near future.

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[141] 609 F.2d at 32 n.10.

The authors of this Article submit that not only is it possible to develop a uniform standard for the prospective enforcement of arbitration awards, but also that such a standard should be seen as a counterbalance to a prospective enforcement of arbitration awards. In addition, such a standard should be considered a fairly severe remedy similar to that of the prospective injunction. As stated in *United Elect. Radio and Mach. Workers v. Honeywell*,[142] prospective enforcement should only be used in those situations in which there is labor hostility, and the arbitration mechanism is not being used in good faith.[143]

There are striking similarities between suits for prospective enforcement and suits brought seeking prospective injunctions. First, the rationales employed by courts such as the Fifth Circuit in refusing to issue prospective injunctions are very similar to the rationales relied upon by federal courts in refusing to prospectively enforce a prior arbitration award.[144] The lack of specificity of a prospective injunction as required by Federal Rule of Civil Procedure 65(d) is very similar to the requirement by most federal circuits that there be a specific degree of factual similarity between a prior arbitration award and a current dispute. Stated differently, if an injunctive order does not specifically state what type of activity is prohibited, the order cannot be enforced. Similarly, if a prior arbitration award is not strictly factually identical, or least substantially similar, then prospective enforcement is not warranted.

Second, a prospective injunction will not be issued when the employer fails to show irreparable injury due to a specific pattern of strikes. In the prospective enforcement context, successful prospective enforcement claims are usually denied unless there is evidence of a pattern of grievances alleging violations of the same contract provision or a series of arbitration awards that adjudicate similar disputes in favor of the union.[145]

Third, prospective injunctions will not be issued when there is a strong policy interest in preserving adjudication of prohibited strike activity on a case-by-case basis. In citing the *Steelworkers' Trilogy*, numerous courts adjudicating prospective enforcement claims have stated that arbitration of individual grievances is the preferred method for labor dispute resolution.[146]

Fourth, an order for a prospective injunction will not be enforced when the order is vague, overbroad, and oversteps the boundaries of a *Boys*

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[142] 522 F.2d 1221 (7th Cir. 1975).

[143] *Id.* at 1228.

[144] *See* Oil, Chem. & Atomic Workers Int'l Union v. Ethyl Corp., 644 F.2d 1044, 1054 (5th Cir. 1981).

[145] *See supra* cases cited note 1.

[146] *See supra* text accompanying note 4.

Markets injunction. Unlike prospective injunctions, prospectively enforced arbitration awards have never been analyzed within the *Boys Markets* framework. The remainder of this Article is devoted to such analysis.

B. *Prospective Enforcement and the* Boys Markets *Threshold Test*

As stated at the outset of this Article, there are two major problems with suits for prospective enforcement. First, prospective enforcement tests devised in the federal courts do not provide adequate standards for judicial review. Each test is ambiguous and requires some degree of interpretation of the collective bargaining agreement.

Second, the federal courts have not articulated those circumstances in which prospective enforcement of a prior arbitration award is warranted. By the court's failure to state when prospective enforcement is an appropriate remedy, unions undoubtedly have chosen not to pursue prospective enforcement of an arbitration award when this remedy may have been warranted. It is a plausible argument that fewer *Boys Markets* injunctions would have been issued if more arbitration awards had been prospectively enforced.

For these reasons, the *Boys Markets* threshold test and the subsequent criteria established by courts issuing prospective injunctions can provide the framework for upholding enforcement claims.

In any suit in which the employer seeks injunctive relief, the reviewing court should first determine whether an injunctive order meets the following requirements: (1) the strike is over a grievance which both parties are contractually bound to arbitrate; (2) the company demanded that the dispute be submitted to arbitration; (3) the collective bargaining agreement contains a no-strike clause; and (4) the issuance for the injunction is necessary to prevent irreparable injury to the plaintiff and such injury is greater than any hardship to the defendant.[147]

These requirements are merely a threshold test to determine whether or not an injunction should be issued when a union has gone on strike despite a no-strike provision in the parties' collective bargaining agreement. After meeting the threshold test, the question remains as to whether a prospective injunction order should be issued despite the Supreme Court's policy of supporting arbitration as the favored method of labor dispute resolution.

In the prospective injunction situation, the courts have relied upon the following criteria: (1) the number of illegal work stoppages in the past; (2) the pattern of illegal work stoppages in the past; (3) the union's proclivity to strike; and (4) the possibility of similar strikes in the future.

The *Boys Markets* threshold test and the criteria developed for

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[147] *Boys Markets*, 398 U.S. at 254.

prospective injunctions are easily adaptable to claims for prospective enforcement of arbitration awards. A reviewing court should first determine whether the union can establish a colorable claim that prospective enforcement of a prior arbitration award is warranted. In this manner the court will meet the threshold test of the *Boys Markets* injunction.[148] Upon determining that such a claim exists, the reviewing court should then utilize the prospective injunction criteria in determining whether prospective enforcement is warranted.

By using this analysis, the federal court is not only able to employ a uniform federal standard, but may also apply the various fact similarity tests adopted in that court's particular federal judicial circuit. The fact similarity tests then become a single rather than a sole criterion used in determining whether a prior arbitration award should be prospectively enforced.

Thus, in a suit for prospective enforcement, the first requirement of the threshold test is whether the prior arbitration award and subsequent grievance, if any, are those which the parties are contractually bound to arbitrate. This first requirement is identical to the first criterion of the *Boys Markets* test.[149] The degree of factual similarity of the prior arbitration award and subsequent violations should not be an issue. The reviewing court need only determine that the current dispute and prior arbitration award are covered by the terms of the collective bargaining agreement.

The second requirement in the prospective enforcement claim is that the prior award was submitted to arbitration, and subsequent grievances regarding the same contract violation were timely filed. Alternatively, if the prior arbitration award was issued prospectively, the reviewing court need not make this determination because the arbitration process was already utilized.

This second requirement corresponds with the second criterion in a *Boys Markets* injunction: the company demands that the dispute be submitted to arbitration.[150] The underlying purpose in either case is to ensure that the parties have attempted to resolve their dispute through arbitration rather than seek judicial resolution.

The third requirement for prospective enforcement is that an arbitration clause should exist in the collective bargaining agreement. The *Boys Markets* requirement that a no-strike clause exist is largely a factual determination.[151] A requirement for an arbitration clause would fulfill the same purpose in the prospective enforcement context.

The fourth requirement is prospective enforcement of an arbitration

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[148] *See Boys Markets*, 398 U.S. at 254. *See also supra* text accompanying note 92.
[149] *Boys Markets*, 398 U.S. at 254.
[150] *Id.*
[151] *See id.*

award that prevents irreparable injury to the plaintiff. Such injury must be greater than any hardship to the defendant. This requirement is substantially identical to the *Boys Markets* requirement and serves several purposes.[152]

By requiring that the union suffer irreparable injury, the courts are protected from a flood of claims for prospective enforcement of arbitration awards. Irreparable injury in the prospective enforcement context would not include sporadic or unrelated violations of the collective bargaining agreement, nor would irreparable injury include those instances in which the employer can articulate a good faith basis for violating the contract.

Further, the "irreparable injury" terminology should be interpreted as one factor indicative of a hostile labor relationship. To successfully bring suit for prospective enforcement of a prior arbitration award, the union should be required to show that the employer willfully and pervasively violated a collective bargaining agreement in contradiction to the prior award.

In prospective injunction cases, evidence of financial hardship suffered by the employer is usually sufficient to prove irreparable injury. Similarly, the union should be required by the court to show that re-arbitration of those grievances similar to the prior award would create a severe financial hardship for the union.

If a federal court determines that the union meets the prospective enforcement threshold test as adopted from *Boys Markets*, and thus can at least bring a prospective enforcement claim, then the court should also require that the union meet the prospective injunction criteria, as modified below, before holding that a prior arbitration award should be given a prospective effect.

C. *The Application of Prospective Injunction Criteria to Prospective Enforcement Suits*

First, the federal court should consider the number of employer violations of the prior arbitration award. This requirement corresponds with the prospective injunction inquiry of the number of illegal work stoppages in the past. The union need only show that there was a sufficient number of grievances or prior arbitration awards that were violated after the prior arbitration award was issued. This is largely an evidentiary issue for the court.

The second prospective injunction requirement is that the illegal work stoppages or prohibited strikes, or both, have a similar basis in fact. Similarly, the second requirement in the prospective enforcement context is that the employer must commit a pattern of violations of the prior

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[152] *See Boys Markets*, 398 U.S. at 254.

arbitration award. Under this requirement, the various fact similarity tests adopted in each federal circuit gain significance. The Court of Appeals for the Fifth Circuit can require "positive assurance" that the previous contract violations are factually similar. The Fifth Circuit can also require "material factual identity" of prior violations. Although the ambiguity of these phrases is not lost, the threshold test and the remaining prospective requirements reduce their subjectivity. Moreover, by including the term "pattern," the court need not interpret the collective bargaining agreement in order to discern whether the employer's subsequent actions violated the collective bargaining agreement. "Pattern" in this context should only mean transactional similarity.

The third criterion in the prospective injunction test is whether the union has demonstrated a proclivity to strike. In a prospective enforcement case, the union must show that the employer has demonstrated a proclivity to willfully and pervasively violate the prior arbitration award. As stated by the Supreme Court in *Emporium Capwell Co. v. Western Addition Community Org.*,[153] "one would hardly expect an employer to continue in effect an employment practice that routinely results in adverse arbitral decision."[154] Thus, not only should the court review the prior conduct of the employer, the union should also be required to prove that the employer has repeatedly violated the contract despite the existence of the prior arbitration award. Under this requirement, the court's decision is much more fact-specific. The court is obligated to examine not only the prior arbitration award but also the parties' labor relationship. Consequently, this requirement eliminates much of the ambiguity and subjectivity of the various prospective enforcement tests currently in existence.

In addition, this requirement eliminates the potential retaliatory claims brought by unions against employers. For example, it is foreseeable that a union may file an unfounded prospective enforcement suit against an employer in order to gain increased bargaining power during negotiations. The fact that the union must prove, or the court must find, the employer's proclivity to willfully and pervasively violate the collective bargaining agreement will eliminate many union claims brought in bad faith.

The fourth and final requirement also eliminates many bad faith claims in that the court must examine the likelihood of the employer violating the prior award in the future. This requirement is similar to the prospective injunction requirement that the court must examine the possibility of strikes in the future.

The most important function of this requirement is that it allows the

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[153] 420 U.S. 50 (1975).

[154] *Id.* at 67.

federal courts to remand the subsequent contract violations to arbitration if violations appear to be unlikely in the future. Because of the Supreme Court's holding in *Textile Workers v. Lincoln Mills*[155] that arbitration is the favored method of labor dispute resolution, the federal courts have been constrained to uphold this policy and limit the scope of judicial review. This fourth requirement allows the courts to continue the Supreme Court's federal labor policy and still entertain suits for prospective enforcement. For example, a federal court may find that the parties have more to gain by deferring the subsequent violations to arbitration than allowing the parties to become embroiled in litigation. Alternatively, the court may find that even though the union's claim is not sufficient to support a suit for prospective enforcement, arbitration would be beneficial. In short, the court may find that arbitration is preferable to a suit for prospective enforcement because the latter will only provide the union and employer with "something more to argue about."

In summary, the prospective enforcement model can be shown as a two prong test. The first prong is the threshold test which requires the following: (1) the prior arbitration award and subsequent grievances are those that the parties are contractually bound to arbitrate; (2) the prior award was submitted to arbitration, and subsequent grievances, or arbitration decisions, were timely filed; (3) an arbitration clause exists in the current collective bargaining agreement; and (4) prospective enforcement of a prior arbitration award is necessary to prevent irreparable injury to the union and such injury is greater than any hardship to the employer.

Assuming a union can meet the threshold test, the reviewing court would then invoke the prospective enforcement criteria as adapted from various federal cases upholding a prospective injunction. These criteria are: (1) there have been several employer violations of the prior arbitration award in the past; (2) such violations constitute a similar pattern with a similar basis in fact; (3) the employer has demonstrated a proclivity to willfully and pervasively violate the prior award; and (4) the employer is likely to violate the prior award in the future.

VI. CONCLUSION

The prospective enforcement test articulated in this Article is easily applicable to every prospective enforcement suit. It is more precise and less subjective than the prospective enforcement tests previously developed in the federal circuits.

By drawing heavily from *Boys Markets*, the prospective enforcement

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[155] 353 U.S. 448 (1957).

test emphasizes the historical relationship between the parties rather than the degree of fact similarity between an arbitration award and a current dispute. Consequently, the prospective enforcement test does not offend federal labor policy because it minimizes, if not eliminates, a surreptitious judicial interpretation of the collective bargaining agreement.

The effectiveness of prospective enforcement as a remedy is largely dictated by its use. Prospective enforcement of a prior arbitration award should be employed in limited contexts, such as when an employer violates a collective bargaining agreement in bad faith. Prospective enforcement thus becomes a counterbalance to prospective injunctions, and the arsenal of labor relations weaponry is more evenly dispersed between the employer and the union.

Moreover, prospective enforcement vindicates prospective injunctions, in those circuits reluctant to issue them, while at the same time limiting the likelihood of their use. A union will not be compelled to strike in violation of a collective bargaining agreement if it is possible to prospectively enforce a prior arbitration award.

As developed in this Article, the greatest benefit of the prospective enforcement test is in the context of its use and as a counterbalancing remedy. Rather than viewed as an aberration of the "garden variety" suit for judicial review, prospective enforcement can and should be seen as a powerful means of furthering labor relations and minimizing industrial strife.